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YAP TEONG PENG & ANOR

v.

YEN KOK HO & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: D8-22-522-2008]
3 NOVEMBER 2008

C ***CONTRACT:*** *Guarantee - Joint and several guarantee - Claim for contribution - Whether right of contribution affected - Contracts Act 1950, s. 99*

CIVIL PROCEDURE: *Summary judgment - Guarantee - Joint and several - Claim for contribution - Whether right of contribution affected - Contracts Act 1950, s. 99*

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This was the plaintiffs' application for summary judgment under O. 14 of the Rules of the High Court 1980. The plaintiffs settled a sum of RM1,272,698.98 as joint and several guarantors of a bank loan granted to a company in which the 2nd plaintiff and the defendants were directors. The plaintiffs now sought contribution from the defendants as joint and several guarantors of the bank loan. The defendants submitted that the 2nd plaintiff had obtained a court order ordering the defendants to purchase his shares in the company and that the defendants procure the release of his liability under the guarantees. The plaintiffs argued that the court order was obtained in a suit on a claim for oppression under s. 181 of the Companies Act 1965. That suit had nothing to do with the suit herein.

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Held (allowing the application):

(1) There was clearly no triable issue in the suit herein that ought to go for trial. A joint and several guarantor is obliged to pay the sum that he jointly and severally guaranteed to pay. That is clear under s. 99 of the Contracts Act 1950 and in the case of *Wong Kim Swee v. Wong Chee Mun & Ors*. The 2nd plaintiff's right of contribution under s. 99 was not affected by the court order he had obtained. His liability under the guarantees was undertaken with the bank and was quite apart from his rights under s. 181 of the Companies Act 1965. (para 5)

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Case(s) referred to:
Wong Kim Swee v. Wong Chee Mun & Ors [1984] 1 LNS 2 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Contracts Act 1950, s. 99
Rules of the High Court 1980, O. 14

For the plaintiffs - Govin Sreedharan; M/s Choong & Co
For the defendants - Lester Ong; M/s William Leong & Co

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: ***(ex-tempore)***

[1] This is an application by the plaintiffs for summary judgment under O. 14 in respect of their claim for contribution as joint and several guarantors of a loan granted to a company known as Angkazen Sdn Bhd of which the 2nd plaintiff is a director together with the defendants.

[2] The plaintiffs have settled the sum claimed by CIMB Bank in the sum of RM1,272,698.98 in full and is now seeking contribution from the other joint and several directors namely the defendants under s. 99 of the Contracts Act 1950 which read as follows:

> **99. Co-sureties liable to contribute equally**
>
> Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Mr Lester Ong For The Defendants

[3] I oppose this application on the following grounds:

A i. The subject matter of this suit which is the repayment of the banking facility is a matter now pending at the Shah Alam High Court. An order by the Shah Alam High Court had been given for the defendants to procure the release of the 2nd plaintiff as the guarantor for the banking facility *(inter alia)*.
B Therefore it is for the defendants and the company to negotiate with the bank in respect of the repayment of the loan. The order was granted on 15 March 2007 and subsequently before the defendants managed to negotiate with the bank in respect of the repayment. The plaintiffs had
C unilaterally negotiated and settled with the bank the sum asked by the bank. By doing so the plaintiffs had caused the bank to recall the whole banking facility that was granted to the company Angkazen.

D **[4] Mr. Govin Sreedharan For The Plaintiffs**

i. The Shah Alam suit has nothing whatsoever to do with this claim as the Shah Alam suit was a claim for oppression under s. 181 of the Companies Act 1965 by which the 2nd plaintiff
E was the petitioner there seeking an order that the company or the respondents therein purchased his shares and to procure his release as guarantor for all loans taken by the company from financial institutions which include the loan the subject in this suit.

F ii. The Shah Alam High Court has granted order in terms for the petition and to date the defendants herein have failed to take any positive steps to procure the release of the 2nd plaintiff as a guarantor. Leave to initiate contempt proceeding had already been obtained from the court. In the meantime the
G bank had made a demand on the company as well as all the guarantors to settle the outstanding debts due to the failure of the company to regularize its account despite three warning letters of reminders requiring the guarantors to pay RM1,272,698.98. The defendants had refused to contribute
H their portion of liability under the guarantee. Hence this action.

iii. See *Wong Kim Swee v. Wong Chee Mun & Ors* [1984] 1 LNS 2 per Justice Abdul Razak at Held:

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Held, allowing the appeal: section 99 of the Contracts Act, 1950 makes it quite clear, that if any of the co-sureties had paid the creditor towards the discharge of the debt and obtained a discharge (of which in this case there was no dispute), then the others were equally liable to contribute to the sum paid towards that discharge. If the payment had effected to discharge the first defendant's land as the additional security, it did not alter the defendant's liability to contribute since a discharge of the debt under the guarantee as provided by section 99 had been effected.

Findings And Decision

[5] There is clearly no triable issue in this suit that ought to go for trial. A joint and several guarantor is obliged to pay the sum that he had jointly and severally guaranteed to pay. This is clear under s. 99 of the Contracts Act 1950 and the case of *Wong Kim Swee, supra*. The fact that the 2nd plaintiff in this case had commenced a petition and obtained an order from the Shah Alam Court that the defendants in the present suit be made to purchase his shares in the company with a further order that the defendants procure the release of his liability under the joint and several guarantees should not affect his right of contribution under s. 99 of the Contracts Act 1950. His liability under the joint and several guarantees is undertaken with the CIMB Bank and is quite apart from his rights under s. 181 of the Companies Act 1965.

Order in terms.